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NO. 34321-5-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFFS' GUILD, and DEPUTY BRIAN LA FRANCE and JANE DOE LA FRANCE, and the marital community composed thereof,

Appellants/Cross-Respondents

vs.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondents/Cross-Appellants,

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCECOUNTY

RESPONDENT/CROSS-APPELLANT KITSAP COUNTY'S AND KITSAP COUNTY SHERIFF'S REPLY BRIEF

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As required by rule, this brief is limited to replying to Section II (page 12 to end) of the Joint Reply Brief of Appellants/Joint Response Brief of Cross-Respondents. This reply incorporates fully Respondent/Cross-Appellant Kitsap County's and Kitsap County Sheriff's opening brief.

I. The *Brady* Rule Requires that LaFrance's Record of Untruthfulness be Disclosed.

One only needs read the *Benn* case to understand the scope and mandate of the *Brady* rule. *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002). *Brady's* disclosure requirement applies "where the defense makes a general request for exculpatory evidence and even where the defense does not make a request for such evidence at all." *Benn v. Lambert*, 283 F.3d at 1053, *citing United States v. Agurs*, 427 U.S. 97, 106, 96 S.Ct 2392, 49 L.Ed.2d 342 (1976). When a witness's "'reliability . . . may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [his] credibility falls within [the *Brady*] rule." *Benn v. Lambert*, at 1054, *quoting Giglio v. U.S.*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), *and citing Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir.1997) ("Material evidence required to be disclosed includes evidence bearing on the credibility of government witnesses."); *United States v. Shaffer*, 789 F.2d 682, 689 (9th Cir.1986) ("[E]vidence affecting

the credibility of a government witness has been held to be material under the Brady doctrine.").

Appellants' accuse the Sheriff and Prosecutor of an hysterical overreaction to LaFrance's record of untruthfulness. Yet, courts rely on the integrity of government agents and prosecutors not to introduce untrustworthy evidence into the system. *United States v. Bernal-Obeso*, 989 F.2d 331, 335 (9th Cir.1993). There should be no question that LaFrance's record of untruthfulness will be, and must be, disclosed in any criminal proceeding where LaFrance is a witness. Unquestionably, the mandate of *Brady* will affect decisions whether to file charges and to issue search warrants. If LaFrance's record of untruthfulness is disclosed to a jury in a criminal trial, a jury may well acquit the defendant.

II. The Policy Favoring Arbitration of Labor Disputes Is Not Sacrosanct Or Absolute; as With All Principles, It Has Its Limits.

A central question at issue before the court is whether an award offends public policy when the award orders a sheriff to reinstate a law enforcement officer who has been found, by clear, cogent, and convincing evidence to have lied numerous times to supervising officers conducting an investigation of the officer's official misconduct. Its not that a law enforcement officer's lying itself violates public policy. What violates public policy is the arbitrator's interpretation of the agreement in this case

requiring the Sheriff to reinstate Deputy LaFrance after finding by clear, cogent, and convincing evidence that LaFrance lied numerous times to supervising officers conducting an investigation of his official misconduct.

"Public policy is a valid basis for judicial decision." *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 785, 819 P.2d 370 (1991). The public policy articulated here is embodied in state statutes, judicial opinions, and the need to secure the public's trust in its government officials.[1] If the reinstatement of Deputy LaFrance fails to comply with public policy requirements in that way, then it should be unenforceable.

Although the policy favoring arbitration of labor disputes is strong, it is neither sacrosanct nor absolute; as with all principles, it has its limits. It is well within a court's power to vacate an arbitration award where it violates public policy. In *Kennewick Educ. Ass'n*, the court held that an award of punitive damages by an arbitrator clearly violated Washington public policy, which disallows punitive damages unless a statute provides for them. *Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17*, 35 Wn.App. 280, 282, 666 P.2d 928 (1983). In *Agnew v. Lacy Co-Ply*, the court held that the language in the contract underlying the arbitration

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[1] RCW 42.20.040; RCW 9a.76.175, RCW 9a.76.202; RCW 9a.80.010; chapter 36.28 RCW; *Brady v.* Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002). *See also* Respondent/Cross-Appellant Kitsap County's and Kitsap County Sheriff's Opening Brief, pp. 17-28.

clearly called for an award of attorney's fees to the prevailing party, which the arbitrator declined to make. *Agnew v. Lacey Co-Ply*, 33 Wn.App. 283, 288, 654 P.2d 712 (1982), *review denied*, 99 Wn.2d 1006 (1983). *See also Golberg v. Sanglier*, 96 Wn.2d 874, 883, 639 P.2d 1347, 647 P.2d 489 (1982) (As a general rule, contracts which are illegal or against public policy will not be enforced by the courts); *Scott By and Through Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 495, 834 P.2d 6 (1992) (to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable).

"The term 'public policy,' . . . embraces all acts or contracts which tend clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 753-754, 845 P.2d 334 (Wn.,1993) (*quoting State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 483, 687 P.2d 1139 (1984); (*quoting LaPoint v. Richards*, 66 Wn.2d 585, 594-95, 403 P.2d 889 (1965)); *see also Makinen v. George*, 19 Wn.2d 340, 354, 142 P.2d 910 (1943) ("[p]ublic policy in its broad sense is that principle of law holding that no citizen can lawfully do that which has a

tendency to be injurious to the public or against the public good"). Public policy is not static, but may change as the relevant factual situation and the thinking of the times change. *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 753-754, 845 P.2d 334 (Wn.,1993) (*citing Pierce v. Yakima Vly. Mem. Hosp. Ass'n*, 43 Wn.2d 162, 166, 260 P.2d 765 (1953).

Federal cases cited by Appellants such as *Eastern Associated Coal Corp. v. UMW*, 531 U.S. 57, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000), are not instructive. In those cases, the U.S. Supreme Court applied its general supervisory authority to limit enforcement of contracts that are contrary to public policy. *See W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983) (*citing Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 92 L.Ed. 1187 (1948), in which the Court refused to enforce racially restrictive covenants that violated public policy as expressed in the Fifteenth Amendment to the United States Constitution and the Civil Rights Act). *In Eastern Associated Coal Corp.*, the Court held that several relevant policies, including policies against drug use that favored rehabilitation and determination of disciplinary questions through arbitration, should be "taken together" when determining if an award violates public policy. 531 U.S. at 58, 121 S.Ct. at 465, 148 L.Ed.2d at 363.

Arbitrator Gaba's decision not only violates public policy, but it exceeds his authority under the parties' collective bargaining agreement. Once Arbitrator Gaba found that LaFrance lied during the official performance of his duties, he exceeded his authority when he addressed the remedy and ordered the Sheriff to reinstate LaFrance to a credibility-sensitive position. The award impermissibly reflects Arbitrator Gaba's "own brand of industrial justice" and on that ground alone should be vacated. We think this is the sort of thing the Court had in mind in *United Steelworkers of America v. Enterprise Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424, when it said, "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The Sheriff is not asking this Court to in any way disturb the *factual findings* of Arbitrator Gaba. This appeal is wholly based on the arbitrator's factual conclusion that while he was on duty, LaFrance lied numerous times to his supervisors who were conducting an official

investigation of LaFrance's misconduct. This Court should reject Arbitrator Gaba's decision insofar as it reinstates LaFrance to a credibility-sensitive position.

The subject of judicial review of labor arbitration awards has amassed a significant body of law in both state and federal courts. The emphasis in all of these decisions is to urge judicial restraint and for the most part give deference to the determination of the arbitrator. The wisdom of this policy has proven itself over time. Nonetheless, as with any issue, courts may not abandon fundamental logic and common sense in order to reach a conclusion consistent with precedent. Even the doctrine of stare decisis is not immutable.

In addition, this case presents an issue as to the potential civil liability of the County were LaFrance to be reinstated. Should LaFrance be found in the future to have been untruthful when exercising his powers of arrest, use of deadly weapons, or to conduct investigations, the County is likely to be held responsible, even though it has done everything in its power to terminate LaFrance from his position of power. This likelihood serves to illustrate the absurd result of deference to this arbitration award.

III. The Petition for Writ of Certiorari Was Filed Within a Reasonable Time.

"[C]onstitutional writs of certiorari need not be sought within the analogous time period ordinarily allowed by statute or rule for filing an appeal. Instead . . . laches, an equitable doctrine, governs the determination of a reasonable time for constitutional writs of certiorari." *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 241, 88 P.3d 375 (2004), *citing Clark County Public Utility District v. Wilkinson*, 139 Wn.2d 840, 847-48, 991 P.2d 1161 (2000). Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay. *Id.* "While a court may look to various factors, including similar statutory and rule limitation periods to determine whether there was an inexcusable delay, the main component of laches is prejudice to the other party." *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d at 241, *citing Clark County Public Utility District v. Wilkinson*, 139 Wn.2d at 848-49, 991 P.2d 1161.

As explained at length in Respondents' opening brief, LaFrance himself delayed the determination whether he was fit for duty and his return to work. See also CP 609-613. Any prejudice LaFrance suffered by the delay in filing the petition for writ of certiorari is the result of LaFrance's own actions.

In addition, there is no dispute that LaFrance was returned to work on April 11, 2005, with full pay and benefits. LaFrance was placed on leave with full pay and benefits on July 25, 2005, when the Sheriff filed the petition. CP 612.

In consideration of the circumstances of this case, the Writ was filed within a reasonable time.

IV. Conclusion

For the foregoing reasons, and for the reasons contained in Respondent/Cross-Appellant Kitsap County's and Kitsap County Sheriff's Opening Brief, the trial court's denial of the writ of certiorari should be reversed.

Respectfully submitted this 7th day of July, 2006.

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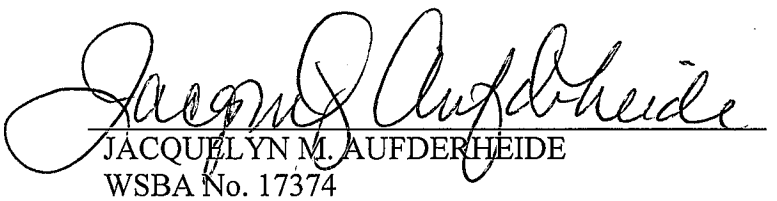

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On September 15, 2006, I caused to be served the above document, entitled RESPONDENT/CROSS-APPELLANT KITSAP COUNTY'S AND KITSAP COUNTY SHERIFF'S REPLY BRIEF, in the manner noted upon the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of September, 2006, at Port Orchard, Washington.

Carrie Bruce

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